EDITOR'S NOTE

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NO. 87-5570

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

LOIS E. HILTON FORD,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Cerrtiorari To
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE RULING OF THE COURT OF APPEALS THAT THE DENIAL OF AN ARTICLE III JUDGE DURING JURY SELECTION IS HARMLESS ERROR DENY THE IMPORTANCE OF THE TRIAL JUDGE IN JURY SELECTION AND IGNORE ESTABLISHED PRECEDENT OF THIS HONORABLE COURT DEALING WITH THE IMPORTANCE OF THE TRIAL JUDGE AND JURY SELECTION IN A CRIMINAL TRIAL?

II. MAY THE GOVERNMENT CONVICT A PERSON OF COVERING UP A MATERIAL FACT TO THE GENERAL SERVICES ADMINISTRATION BY REPRESENTING THAT A CHECK WAS COVERED BY SUFFICIENT FUNDS WHEN THE PROOF SHOWS THAT PETITIONER MERELY PRESENTED A CHECK WHICH AT THE TIME WAS NOT COVERED BY SUFFICIENT FUNDS BUT WITH NO OTHER ASSERTIONS OF FACT BY THE PETITIONER?

III. WHEN THE GOVERNMENT ALLEGES A NUMBER OF MOTOR VECHICLES BEING INVOLVED IN THE CONSPIRACY, MUST THE GOVERNMENT PROVE THE CHIEF IDENTIFYING CHARACTERISTIC AS ALLEGED; SPECIFICALLY, THE UNIQUE VEHICLE IDENTIFICATION NUMBER?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

NO._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

LOIS E. HILTON FORD,
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VS.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 11, 1987, and no rehearing was filed.

OPINIONS BELOW

The first opinion of the Court of Appeals is published at 797 F.2d 1329 (5th Cir., 1986, rehearing denied September 18, 1986), Cert. denied 107 S.Ct. 964 (1987). The Court of Appeals granted rehearing En Banc on their own motion after the denial of certiorari by this Honorable Court. United States v. Ford, 811 F.2d 268 (5th Cir., 1987). After reconsideration, the Court of Appeals reissued their ruling finding that their was no congressional intent to allow jury selection by United States Magistrates in the opinion issued August 11, 1987 (appendices A, B, and C). The judgement and commitment order of the trial court pursuant to the jury verdict appears as appendices D and E.

JURISDICTION

The first judgment of the United States Court of Appeals for

the Fifth Circuit was entered August 22, 1986. The Court of Appeals denied the timely filed petition for rehearing on September 18, 1986. A petition for writ of certiorari was timely filed with this Honorable Court on November 17, 1986 in number 86-5865. The writ and motion to defer consideration due to pending action by the Court of Appeals were both denied on January 27, 1987. On February 10, 1987 the Court of Appeals issued an order vacating the order overruling the motion for rehearing and granting rehearing En Banc. The Court of Appeals sitting En Banc issued a new opinion determining that it was improper for a magistrate to select a jury in a felony criminal trial. The En Banc opinion was issued on August 11, 1987. This Petition for writ of certiroari is filed within sixty (60) days after the final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1) Petitioner is entitled to proceed in forma pauperis pursuant to 18 U.S.C. 3006A (d) (b) and Rule 46.1 of the Rules of the Supreme Court of the United States because counsel was appointed pursuant to the Criminal Justice Act to perfect the appeals for Petitioner.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 641, in pertinent part as follows:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conoveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted-
>
> Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Title 18, United States Code, Section 642, in pertinent part

as follows:

> Whoever, without authority from the United States, secretes within, or embezzles, or takes and carries away from any building, room, office apartment, vault, safe, or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any tool, implement, or thing used or fitted to be used in stamping or printing, or in making some other tool or implement used or fitted to be used in stamping or printing any kind or description of bond, bill, note, certificate, coupon, postage stamp, revenue stamp, fractional currrency note, or other paper, instrument, obligation, device, or document, authorized by law to be printed, stamped, sealed, prepared, issued, uttered, or put in circulation on behalf of the United States; or
>
> Whoever, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material prepared and intended to be used in the making of any such papers, instruments, obligations, devices, or documents; or
>
> Whoever, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material printed or stamped, in whole or part, and intended to be prepared, issued, or put in circulation on behalf of the United States as one of such papers, instruments, or obligations, or printed or stamped, in whole or part, in the similitude of any such paper, instrument, or obligation, whether intended to issue or put the same in circulation or not-
>
> Shall be fined not more than $5,000 or imprisoned not more than ten years or both.

Title 18, United States Code, Section 1001, in pertinent part as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 3401, in pertinent part as follows:

> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, and under such conditions as may be imposed by the terms of the special designation, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, minor offenses committed within that judicial district.
>
> (b) Any person charged with a minor offense may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefullly explain to the defendant that he has a right to trial by jury before such judge and

shall not proceed to try the case unless the defendant, after such explanation, signs a written consent to be tried before the magistrate that specifically waives both a trial before a judge of the district court and any right to trial by jury that he may have.

(c) A magistrate who exercises trial jurisdiction under this section, and before whom a person is convicted or pleads either guilty or nolo contendere, may, with the approval of a judge of the district court, direct the probation service of the court to conduct a presentence investigation on that person and render a report to the the magistrate prior to the imposition of sentence.

(d) The probation laws shall be applicable to persons tried by a magistrate under this section, and such officer shall have power to grant probation and to revoke or reinstate the probation of any person granted probation by him.

(e) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. For purposes of appeal a copy of the record of such proceedings shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefore, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(f) As used in this section, the term "minor offenses" means misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both, except that such term does not include any offense punishable under any of the following provisions of law: Section 102 of the Revised Statutes, as amended (2 U.S.C. 192 [2 USCS 192]); section 314(a) of the Federal Corrupt Practices Act, 1925 (2 U.S.C. 252 (a)); and sections 210, 211, 242, 594, 597, 599, 600, 601, 1304, 1504, 1508, 1509, 2234, 2235, and 2236 of title 18, United States Code [18 USCS 210, 211, 242, 594, 597, 599, 600, 601, 1304, 1504, 1508, 1509, 2234, 2235, 2236].

Local Rules of Practice before the United States District Courts for the Northern District of Texas, Rule 1.3 in pertinent part as follows:

Rule 1.3: United States Magistrates

> The United States Magistrates of the Northern District of Texas shall have the powers granted by the current Order for the Adoption of Rules for the Exercise of Powers and Performance of Duties by United States Magistrates (Misc. Order No. 6). (See Appendix V).

Local Rules of Practice Before the United States District Courts For the Northern District of Texas, Miscellaneous Order No. 6, in pertinent part as follows:

> "Rule 2
>
> Additional Powers and Duties of Magistrates under 28 U.S.C. 636(b)
>
> Upon entry of an order of reference by a District Judge, or

when required to do so under the provisions of a local rule or general order of this Court, a magistrate may perform any of the following additional duties, and shall have all powers necessary to perform such duties. Provided, however, that no part time magistrate specially designated to perform such additional duties, nor any partner or associate of such part time magistrate, shall appear as counsel in any case before this Court when to do so would constitute a violation of the Conflict of Interest Rules for Part Time Magistrates promulgated by the Director of the Administrative Office of the United States Courts [1.3(b)(i)-(viii), Regulations of the Directory of the Administrative Office of the United States Courts Governing the Administration of the United States Magistrates System].

...

(f) Miscellaneous Duties.

...

(5) Conduct of voir dire and selection of juries for district judges in civil and criminal cases with consent of the parties and the District Judge.

..."

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall be ... deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall be ... deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

Petitioner was convicted by a jury of the offenses of conspiracy to steal property of the United States Government, covering up a material fact to a Governmental Agency, and two (2) counts of theft of Government property and aiding and abetting. (Appendices C and D).

Petitioner appealed the conviction to the Fifth Circuit Court of Appeals. The panel opinion of the Fifth Circuit Court of Appeals affirming the conviction was entered on August 22, 1986. The timely filed Motion for Rehearing was denied September 18, 1986. The panel opinion of the Fifth Circuit Court of Appeals was published at 797 F.2d 1329 (5th Cir., 1986).

This Honorable Court denied certiorari on the first application involving the first opinion after being notified that the Fifth Circuit Court of Appeals was reconsidering the case En Banc United States v. Ford, 107 S. Ct. 964 (1987). After the denial of certiorair by this Honorable Court, the Fifth Circuit Court of Appeals issued an order withdrawing their denial of the Motion for Rehearing and granting rehearing En Banc. United States v. Ford, 811 F.2d 268 (5th Cir., 1987). After the reconsideration the Court of Appeals sitting En Banc held that the magistrate was not authorized to conduct jury selection in a felony case but held that the error was somehow harmless error. The Fifth Circuit Court of Appeals reinstated the remainder of the opinion found at 797 F.2d 1329. United states v. Ford, _____ F.2d _____ (5th Cir., 1987).

B. Statement of Facts

This case involves a seven count indictment alleging various acts by the four (4) defendants to steal property from the United States Government. Petitioner is accused in Count 1 of conspiracy, in Count 3 of theft of government property over the value of $100.00, in Count 4 with covering up a material fact by presenting an insufficient check, and in Count 5 of theft of Government property over the value of $100.00. (R., Vol. 1, p. 1-10).

At trial, the Government presented testimony to show that the Petitioner and the other co-defendants submitted bids for various surplus vehicles offered by sale by the General Services Administration. (R., Vol. 3, p. 41-43) The Government further presented evidence that Petitioner and the co-defendants would pay for the motor vechicles upon which they had submitted a successful bid with a check drawn upon an account which when the checks were presented held insufficient funds to cover the checks. (R., Vol. 3, p. 58-62). The Government further presented evidence that when the checks were returned marked insufficient funds and account closed by the banks that demand was made on Petitioner and the others for payment. (R., Vol. 4, p. 155-157).

After a trial by jury, the two defendants who went to trial

were convicted on all counts.

Petitioner was sentenced by the trial judge to three years confinement on each of the four counts with the fourth count to be probated and to run consecutively to the other three counts. (R., Vol. 1, p. 120). Notice of appeal was timely given on February 11, 1986. (R., Vol. II, p. 122) Petitioner has duly perfected this her second application for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ. Although the Court of Appeals correctly ruled that Congress clearly and obviously did not intend for a magistrate to be empowered to select an Anticle III jury in the place and stead of an Article III judge, the ruling by the Court of Appeals that the error was harmless beyond a reasonable doubt denies a significant number of rulings by this Honorable Court that major error in jury selection effectively prevents application of the harmless error rule. Gray v. Mississippi, 55 U.S.L.W. at 4638; Wainwright v. Witt, 469 U.S. 412 (1985). In addition this Honorable Court has for over one hundred (100) years placed great importance in the ability of the trial judge to observe the manner of a juror in answering questions as well as to hear the actual answer which may be only half the story and, therefore, only half the truth. Wain-wright v. Witt, supra; Reynolds v. United States, 98 U.S. 145 (1879)

Another important issue raised by this application for writ cerrtiorari is the sufficiency of the evidence questions on two of the counts. To answer one question, this Court needs to determine if a check which this Court has held is not a "statement" of any type for purposes of prosecution under Title 18 U.S.C., Section 1014 can be a false "representation" under Title 18 U.S.C. Section 1001. The second question along these lines deals with whether or

not the Government must prove unique descriptive averments in the indictment as alleged.

II.

THE RULING OF THE COURT OF APPEALS THAT THE DENIAL OF AN ARTICLE III JUDGE DURING JURY SELECTION IS HARMLESS ERROR DENY THE IMPORTANCE OF THE TRIAL JUDGE IN JURY SELECTION AND IGNORE ESTABLISHED PRECEDENT OF THIS HONORABLE COURT DEALING WITH THE IMPORTANCE OF THE TRIAL JUDGE AND JURY SELECTION IN A CRIMINAL TRIAL.

This Honorable Court early on recognized the importance of a trial judge's observations of a potential juror during his answers to questioning in order to determine a question of fact correctly. Reynolds v. United States, 98 U.S. 145 (1879). Further, in 1899, this Honorable Court held that a trial by jury "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." Capital Traction Company v. Hof, 174 U.S. 1, 19 S. Ct. 580, 43 L.Ed 873 (1899).

This Honorable Court appears to have reaffirmed its recognition of the importance of the trial judge in jury selection in the recent cases of Wainwright v. Witt, 469 U.S. 412, (1985); Gray v. Mississippi, 55 U.S.L.W. 4638. In addition, this Court correctly held in Gray v. Mississippi, supra at p. 4643 that the "nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless". The reason for such a holding is sound. The citizens ultimately chosen to sit in judgment of a fellow human being are critical to a fair trial mandated by Article III of the Constitution itself and the Sixth Amendment as well and the process for their selection is for all intents and purposes outcome determinative. So long as there exists the slightest question of fact to be determined by the jury; the attitudes of the prospective jurors, their life experiences, their outlooks on life, their faith or lack of it, are indespensible bits of data crucial to the trial lawyer's selection of the jury. But more important than probably

all of them combined in the interplay or response of the potential jurors to the trial judge, their attentiveness to the trial judge's instructions, and their apparent reverence for the man or woman who is going to preside over the trial of the citizen accused of having engaged in anti-social conduct or at least conduct deemed by the Congress worthy of suppression.

The ruling by the Fifth Circuit Court of Appeals that the denial of an Article III judge is harmless error has far reaching impact and importance to the jurisprudence of this Country which reaches far beyond the effect the erroneous harmless error ruling has on Petitioner in this case. By the holding of the Fifth Circuit Court of Appelas, a trial court could designate the plumber who stopped by to fix the sink to select the jury in a criminal trial and so long as the litigants could not point to some action or actions on the part of the plumber which deprived the accused of a fair trial, then the harmless error rule could be used to sustain the conviction. The entire jury selection process was tainted and void and yet the Fifth Circuit Court of appeals holds this to be harmless error! No court has ever gone this far in invoking the harmless error rule to justify such gross blantant error in a trial. The process of jury selection is so delicate and personal that it is incapable of having the harmless error rule invoked.

The pronouncement by the Fifth Circuit Court of Appeals that "But because Lois Ford did not abject and because the trial was fundamentally fair, we AFFIRM" ignores not only the importance of jury selection and the importance of a trial judge in a criminal trial but also ignores the local rule which mandated not just fail to object but actual concert of the portier to the procedure which requirement excuses a failure on the part of the litigants to object.

The Court of Appeals has made a significant and important ruling on an area of law which will have a wide and varied effect on other cases to be tried throughout the country. This Honorable Court should review the erroneous application of the harmless

error rule to the error contained in the case herein.

III.

THE HOLDING OF THE COURT OF APPEALS THAT GGIVING OF AN INSUFFICIENT CHECK MAY BE A COVERING UP OF A MATERIAL FACT IS IN CONFLICT WITH THIS COURT'S RULING IN WILLIAMS V. UNITED STATES, 458 U.S. 279

This Honorable Court ruled in Williams, v. United States, 458 U.S. 279, 73 L.Ed.2d 767, 102 S.Ct 3088 (1982) that "a check is not a factual assertion at all, and therefore cannot be characerized as 'true' or 'false'" when considered in a prosecution for making a false statement in violation of 18 United States Code, Section 1014. The question Petitioner asks this Honorable Court to address is whether the presentment of a check not covered by sufficient funds without further statements by the accused is sufficient to amount to a covering up of a material fact as alleged in Petitioner's indictment. Petitioner contends that the reasoning of this Honorable Court in the Williams case clearly controls the disposition of her prosecution. To cover up a material fact requires some affirmative act or statement. This Court reasoned that a check being merely a draft payable on demand and that the drawer, upon dishonor of the the draft and the requisite notice of the dishonor or protect will pay the amount of the draft to the holder. Williams v. United States, supra at p. 284-285. Because the Government failed to show more than that the Petitioner presented the check as payment for the property and made no other assertions of the validity of the check and she took no affirmtive actions to prevent discovery of the insufficiency of the funds on deposit, there is insufficient proof of the covering up of a material fact. The validity of the check could have been verified by a simple telephone call to the bank. Under the Williams case there can be no cover up simply by presentation of an insufficient funds check. Petitioner said nothing when she presented the check. (Appendix F) Petitioner contends that silence alone cannot equal a cover up.

This Honorable Court should address the issue of whether the Williams case is applicable to a prosecution under Title 18 United States Code, Section 1001 Petitioner requests this Court grant

this application for writ of certiorari.

IV.

THE HOLDING OF THE COURT OF APPEALS THAT THE GOVERNMENT NEED NOT PROVE A UNIQUELY IDENTIFYING DESCRIPTION OF PROPERTY IS ERRONEOUS AND IN CONFLICT WITH THIS COURT'S RULING IN UNITED STATES V. HARDYMAN, 10 L.Ed. 113.

This Honorable Court in the old case of United States v. Hardyman, 10 L.Ed. 113 held that the Government must prove descriptive allegations as alleged. More recently this Court has held that a defendant is entitled to a judgment of acquittal where the evidence adduced at trial is at a material variance to the proof at trial Dunn v. United States, 442 U.S. 100, 60 L.Ed.2d 743, 99 S. Ct. 2190(1979C) Petitioner concedes that a variance in the description of property is not usually a material variance. Montgomery v. United States, 162 U.S. 410; 40 L.Ed. 1020; 16 S.Ct. 797 1896). The variance is material, however, when the conviction could not be used as a plea in bar to a subsequent prosecution. United States v. Morris, 623 F.2d 145 (10th Cir., 1980); cert. denied 449 U.S. 1065, 66 L.Ed.2d 609, 101 S.Ct. 793.

Since the Government alledged in Count I of the indictment that the defendants, including Petitioner, did embezzle, steal, and purloin a total of sixteen (16) automobiles; describing only ten (10) of the vehicles by make, model, and vehicle identification number, the Petitioner can only rely upon the description contained within the indictment to be able to plead her convictions in bar of a future prosecution. (Appendix E) Her dilemma is obvious. She is tried for stealing a specific motor vehicle; presumably one of the sixteen (16) alleged in Count I of the indictment; and has had that vehicle identified by the unique vehicle identfication number but when the Government fails to prove the only descriptive characteristic unique to every vehicle her conviction is still allowed to stand and she may be tried later for the one alleged when the Government can muster sufficient evidence to prove the allegation. There is no proof that the vehicle alleged does not exist, but rather only that the vehicle alleged and the vehicle proved at trial have similar

physical characteristics though different vehicle identification numbers. The reason unique vehicle identification numbers are placed on every 1978 Dodge Pickup that was made is so that one 1978 Dodge Pickup can be conclusively identified from any other 1978 Dodge Pickup. The fact that the vehicle identification number as the one alleged is somewhat similar to the one proved at trial is not controlling. Since it only takes one digit to distinguish one vehicle from another and since the Government normally purchases supplies including vehicles in bulk, it would not be unusual for two vehicles to have grossly similar numbers. In fact, the two similar motor vehicles alleged in Count I of the indictment in Overt Act 2 have only the last four digits in their vehicle identification number at a variance. Clearly when the variance in the proof and the allegations involves a descriptive averment that has the effect of uniquely identifying the property, the variance by definition is material. When the variance voids the ability of the accused to plead the conviction in bar of future prosecutions then the variance voids the conviction. The variance in the present case should void Petitioner's conviction. If an accused cannot rely upon the descriptive averments which identify The property to the exclusion of all other similar pieces of property, then what notice is there of the charges against which one is called upon to defend? There must be some right to notice left in the Constitution.

Petitioner prays this Honorable Court to grant her application for writ of certiorari in order to review this error.

CONCLUSION

For the reasons stated above, Petitioner alleges that there are special and important reasons for this Honorable Court to consider the issues presented herein.

Accordingly, Petitioner respectfully prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted;

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Attorney for Petitioner

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87-5570

September 25, 1987

Mr. Alexander L. Stevas
Clerk of the U.S. Supreme Court
No. 1, First Street N.E.
Washington, D.C. 20543

RE: Ford vs. U.S.A.

Dear Mr. Stevas,

I have enclosed the original of a writ of certiorori which I am filing on behalf of Petitioner Lois E. Hilton Ford whom I am representing pursuant to my appointment by the Honorable David O. Belew in accordance with the Criminal Justice Act. The previous petition denied by the Supreme Court on January 27, 1987 was before the Fifth Circuit Court of Appeals changed their decision on the merits but not the ultimate outcome of the case on August 11, 1987.

I ask that you present the petition to the Court at your earliest opportunity. I will soon forward a motion to stay execution of the mandate for consideration by the Court.

I thank you for your help and if there are any problems, please contact me.

Sincerely:

DANNY D. BURNS
Attorney at Law

DDB/mj
Enclosures

cc: Honorable Charles Fried
Mr. Sidney Powell
Mr. J. Michael Worley

87-5570

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1098

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

LOIS E. HILTON FORD, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(August 11, 1987)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Today the goverment argues that Congress intended by the Federal Magistrates Act to grant to judges of United States District Courts authority to delegate to a magistrate as an "additional duty" the power to preside over the selection of the jury in felony cases. Given the grave constitutional questions such a construction would pose and the history and structure of the legislation creating the office of United States Magistrates, we are not persuaded of such congressional purpose.

Appendix "A"

We hold that the district court erred in allowing a magistrate to preside over jury selection. Neither the government nor the defendant objected to the substitution of the magistrate, however. Persuaded that the error was harmless beyond reasonable doubt and that the trial was fundamentally fair, we affirm the conviction.

I

-A-

Lois Ford was convicted by a federal jury in Fort Worth, Texas, of stealing government property. The government proved that Ford and others bid for surplus vehicles offered for sale by General Services Administration and gave worthless checks in payment.

She appealed, attacking her conviction on three grounds. She argued that the district court erred in directing the magistrate to preside over jury selection, that the evidence was insufficient that any concealed facts were material, and that the trial proof varied from the indictment.

A panel of this court affirmed, rejecting all of Ford's contentions.[1] The panel found that the congressional grant to district judges of the power to give to magistrates additional duties, not inconsistent with other law or the Constitution,

1/United States v. Ford, 797 F.2d 1329, 1335 (5th Cir. 1986), cert. denied, 107 S.Ct. 964 (1987).

included the power to direct magistrates to preside over jury selection in felony cases; that such delegation violated no law and was constitutional.[2] We took the case en banc,[3] and today reinstate the panel opinion in all respects except its treatment of the role of the magistrate in jury selection.

-B-

A United States Magistrate presided over the selection of the jury, which took some four hours despite the routine nature of the charges. The magistrate first summarized the indictment for the venire, introduced all counsel, and then personally interrogated each member of the venire. He gave a substantially complete jury charge, explaining the burden of proof in a criminal case, the presumption of innocence, the right of an accused not to testify, that statements and arguments of lawyers are not evidence, that objections of lawyers are to be disregarded, the nature of circumstantial evidence including a metaphor about wet grass, the judging of witness credibility, that jurors were not to communicate with others about the case, and the sequence of proof in a criminal case. Finally, the magistrate charged the venire not to read about the case or undertake research on its own. At this juncture, he allowed

2/Id. at 1330-33.

3/United States v. Ford, 811 F.2d 268, 269 (5th Cir. 1987).

counsel to question the panel, then set the number of peremptory challenges--twelve strikes to be exercised jointly.

The selection was not free of difficulty. Ms. Demerson, a member of the venire, expressed "mixed feelings." She explained, "[W]hen you said circumstantial evidence and things, my son was killed in October [an apparent robbery victim eleven months earlier], and the evidence that they gave me, it happened isn't clear in my mind, and I still have doubts about it. . . . [H]e was killed in process of robbery, and the answers that they gave me has been two different sets of answers. . . ." When the prosecutor asked whether she could accept direct and circumstantial evidence, she replied, "I think I could." After some exchanges, the magistrate rejected a defense challenge for cause.

The magistrate seated the selected jurors with two alternates in the jury box and excused the rest of the venire. After again instructing the jury not to discuss the case, he explained when the district judge planned to start the trial and instructed them to report to the jury room on that day.

While the local rules of the Northern District of Texas provide that a magistrate can preside over jury selection "with consent of the parties and the District Judge,"[4] the rules make no explicit provision for review of any of the magistrate's

4/N.D. Tex. R. 2(f)(5).

rulings during voir dire, but provide generally that when reviewing non-dispositive rulings:

> No ruling of a magistrate in any matter which he is empowered to hear and determine shall be reversed, vacated or modified on appeal unless the district judge shall determine that the findings of the magistrate are clearly erroneous, or that the magistrate's ruling is contrary to law or constitutes an abuse of discretion.[5]

Neither the government nor defense counsel either expressly consented or objected to the magistrate's presiding over jury selection. The district judge was not available until two days after the petit jury had been carved from the venire. There was no attempt to obtain review by the district judge of the magistrate's rulings and in particular his rejection of the defense challenge for cause of Ms. Demerson.

II

The Magistrates Act of 1968[6] abolished the system of United States Commissioners, replacing it with a system of United States Magistrates. The Act required that all magistrates be attorneys if possible, eliminated the "anachronistic fee system of compensation," gave magistrates a secure eight-year term, and expanded their jurisdiction.[7]

5/N.D. Tex. R. 4(b)(2).

6/1968 U.S. Code Cong. & Admin. News 1280 (current version at 28 U.S.C. §§ 631-639).

7/H.R. Rep. No. 1629, 90th Cong., 2d Sess., reprinted in 1968

Section 636 of the Act, which defined magistrates' powers, empowered magistrates to try petty criminal offenses, generating considerable debate over whether magistrates could do so consistently with article III.[8] Chief Justice Burger noted that the Judicial Conference of the United States objected to § 636 in its entirety, "fearing it so broad as to be subject to constitutional attack."[9] Throughout the debate, there was no suggestion that the Act authorized magistrates to conduct the trial of other than petty offenses. The implicit assumption was that magistrates presiding over the trial of felonies was not envisioned, to a certainty--despite the presence of the additional duty language now said to allow magistrates to preside over jury selection in felony cases.[10]

U.S. Code Cong. & Admin. News 4252, 4254.

8/See, e.g., id., reprinted in 1968 U.S. Code Cong. & Admin. News at 4266-70 (dissenting views of Mr. Cahill).

9/Wingo v. Wedding, 418 U.S. 461, 484 (1974) (Burger, C.J., dissenting).

10/Section 636(b) of the 1968 Act provided:

> Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States (emphasis supplied).

The Magistrates Act was not changed in any relevant way until 1976. In 1974, the Supreme Court held that magistrates could not conduct evidentiary hearings in a petition for federal habeas corpus filed by a state prisoner because it was "inconsistent with the . . . laws of the United States" within the meaning of the Federal Magistrates Act.[11] More specifically, the court held that the Habeas Corpus Act as consolidated into 28 U.S.C. § 2243 required decisions by an article III judge. But the Court did not rest there, explaining, "We conclude further that [Local Rule 16] is to that extent invalid because, as we construe § 636(b), that section itself precludes district judges from assigning magistrates the duty of conducting evidentiary hearings."[12]

The Act also provided that:

> The additional duties authorized by rule may include, but are not restricted to--
>
> (1) service as a special master in an appropriate civil action . . . ;
>
> (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> (3) preliminary review of application for posttrial relief. . . .

28 U.S.C. § 636(b) (amended 1976).

11/Wingo, 418 U.S. at 472.

Two years later, Congress, in response to Wingo, amended the Magistates Act to clarify that a magistrate

> shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court.[13]

This 1976 amendnent revised the magistrates' powers into four parts,[14] providing in the first that a judge can designate a

12/Id. (emphasis supplied). The Court looked to the legislative history and concluded that Congress did not intend in the 1968 Act that magistrates conduct evidentiary hearings. It rejected the suggestion that evidentiary hearings could be assigned under the language of additional duty.

It is then plain that "additional duty" has never been seen as a primary grant of power. As we explain, Congress responded to Wingo by adding a new section. It did not change the additional duty language.

13/H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6165.

14/Section 636(b) provides:

> (1) Notwithstanding any provision of law to the contrary--
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of

magistrate "to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, [and] to suppress evidence in a criminal case. . . ."[15] Significantly, Congress provided that a judge may reconsider the

> fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.
>
> (2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.
>
> (3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.
>
> (4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

15/28 U.S.C. § 636(b)(1)(A).

matters referred under this grant "where it has been shown that the magistrate's order is clearly erroneous or contrary to law."[16]

In this new first part, Congress also allowed district judges to designate magistrates "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations . . . for any motion."[17] Finally it detailed a system by which "[a] judge of the court shall make a de novo determination of those portions of the [magistrate's] report . . . to which objection is made."[18]

In the second part, Congress gave to district judges the power to appoint a special master to serve in civil cases upon consent of the parties.[19]

Congress retained the additional duty provision from the Magistrates Act of 1968 as the third part without relevant change in language and without mentioning either the mechanics or the standard for review by a judge of any additional duty assigned to a magistrate.[20] Intending that courts be innovative in their

16/Id.

17/28 U.S.C. § 636(b)(1)(B).

18/28 U.S.C. § 636(b)(1).

19/28 U.S.C. § 636(b)(2).

20/28 U.S.C. § 636(b)(3).

use of magistrates, Congress suggested that "district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.'"[21] However, this legislative entreaty was in a quest for "increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties."[22]

Finally, Congress in the fourth part detailed for the first time procedures and circumstances under which magistrates could, with the consent of the parties, try civil cases.[23]

III

In its consideration of the Magistrates Act of 1968 and its amendment in 1976, Congress was wary of the strictures of article III and the demands of due process. That sensitivity proved to be well-founded. The 1976 amendment granting district judges the power to delegate to magistrates the determination of dispositive motions, such as motions to suppress, was promptly challenged, reaching the Supreme Court in 1980.[24] Congress had carefully provided for de novo determination by district judges of proposed

21/H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172.

22/Id.

23/28 U.S.C. § 636(c).

24/United States v. Raddatz, 447 U.S. 667 (1980).

rulings on dispositive motions, convinced that this superintendence resolved any article III concerns. A divided court in Raddatz agreed. Three justices dissented, with Justices Blackmun and Powell writing special concurrences. The dividing issue was whether judicial superintendence essential to article III placement of judicial power required that a district judge hear the evidence anew when a challenged ruling on a dispositive motion turned on credibility findings. Four justices thought such review essential. In any event, there was no disagreement that congressional concern over the limiting force of article III prompted the detailing of review procedures for pretrial dispositive motions in criminal cases.

The Raddatz majority responded to the observation that such pretrial decisions can be just as determinative as many trial rulings by emphasizing the difference between pretrial and trial proceedings. In distinguishing pretrial from trial matters the Raddatz majority observed that the "Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than those in criminal trial itself"[25/] and pointed out that "[a] defendant who has not prevailed at the suppression hearing remains free to present evidence and argue to--and may persuade--the jury that the confession was not

25/Id. at 679.

reliable and therefore should be disregarded."[26/] Justice Marshall, with whom Justice Brennan joined, urged that the Act would violate article III and deny due process unless construed to require that an article III judge hear the testimony anew when credibility was at issue.[27/] Justice Powell agreed that, in such circumstances, due process would require a fresh hearing.[28/] Finally, Justice Stewart, joined by Justices Marshall and Brennan, read the Act to require a fresh hearing.[29/]

Raddatz furnishes two relevant insights. First, if Congress intended that magistrates could be assigned the additional duty of presiding over the trial of felony cases, the struggle over petty offenses in the 1968 Act and the concerns over pretrial ruling authority, explicitly provided for, would make no sense. Similarly, if the Court believed that to be the intent of Congress, the Raddatz majority's effort to distinguish pretrial and trial would be superfluous.

We need not decide whether Congress has the power to allow a district judge to delegate the trial of felony cases to a magistrate. It is sufficient here to simply observe that such a

26/Id. at 678 (footnote omitted).

27/Id. at 694-95 (Marshall, J., dissenting).

28/Id. at 686 (Powell, J., concurring in part and dissenting in part).

29/Id. at 692 (Stewart, J., dissenting).

construction would pose grave constitutional issues.30/ We are obligated, of course, to read statutes to avoid constitutional difficulty. Relatedly, we insist upon clear congressional expression when the reach of claimed reading provokes issues regarding constitutionally mandated spheres of governmental power. For example, "[T]he Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity. . . ."31/ In short, we do not lightly engage such fundamental issues, but rather we properly avoid them when we may fairly do so. We are then not persuaded that Congress intended to grant to district judges the power to delegate the trial of felony cases themselves.

IV

But of course the defense of a magistrate presiding over jury selection does not rest on the assertion that an additional duty could include presiding over trial of felonies. Rather, it is suggested that jury selection is sufficiently preliminary to the "trial" of a criminal case to escape constitutional concerns

30/See generally Geras v. Lafayette Display Fixtures, 742 F.2d 1037, 1045 (7th Cir. 1984) (Posner, J., dissenting); see also Comment, The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates, 52 U. Chi. L. Rev. 1032 (1985); Comment, Is the Federal Magistrate Act Constitutional After Northern Pipeline? 1985 Ariz. St. L.J. 189.

31/Welch v. State Dep't of Highways & Pub. Transp., 55 U.S.L.W. 5046, 5049 (U.S. June 25, 1987) (citation omitted).

and difficulties of statutory construction attending the assertion that an additional duty may include presiding over the trial itself. We reject this effort to separate jury selection and trial for two reasons.

First, we see the selection of the jury as an essential component of the trial itself "because the impartiality of the adjudicator goes to the very integrity of the legal system."32/ Second, even if viewed as a pretrial matter, the difficulties of review by an article III judge of a magistrate's rulings in jury selection--and the absence of a statutory procedure for that review in the face of explicit review procedures for other pretrial matters--leaves us unconvinced that Congress intended to allow delegation of this important task.

The selection of a petit jury from a venire is an important part of trial. At common law only the judge could preside over jury selection in felony cases.33/ Its tie to trial is also illustrated by consistent judicial insistence upon its fairness as a component of trial. The Supreme Court has noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury."34/ Only this past term the Court has

32/Gray v. Mississippi, 55 U.S.L.W. 4638, 4643 (U.S. May 18, 1987).

33/4 William Blackstone, Commentaries *353.

34/Swain v. Alabama, 380 U.S. 202, 219 (1965).

attempted to free the selection process of racial bias by prescribing a process for claims that the prosecutor is using peremptory challenges to exclude racial minorities.[35] Such concern plainly rejects the view that jury selection is a preliminary and essentially ministerial act. At the least it is an essential instrument to the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process, if not the trial guarantees of the sixth amendment and section 2 of article III themselves.

At some point the accusatory process shifts from a fact-gathering and charging phase to its primary task of deciding guilt. It is suggested that this ought to be a floating point that adjusts to the issue. This suggestion gathers strength from the circumstance that double jeopardy does not attach until the jury is sworn. But all other trial protections are in force when jury selection begins. For example jury selection is a part of the trial for purposes of the Speedy Trial Act.[36] The rights of the accused to be present, of confrontation, of counsel, and of public proceedings do not await the swearing of the petit jury, but are all enjoyed at the jury selection stage. That defendants

35/See Batson v. Kentucky, 106 S.Ct. 1712 (1986); see also H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1792 (discussing the Jury Selection and Service Act of 1968).

36/18 U.S.C. §§ 3161-3174.

enjoy such rights during jury selection ought not be surprising. "Due process implies a tribunal both impartial and mentally competent to afford a hearing,"[37] "a jury capable and willing to decide the case solely on the evidence before it."[38]

That double jeopardy does not attach until a jury is sworn does not suggest that the selection of the petit jury is preliminary. The jeopardy line is an accomodation of the government's prosecutorial discretion and fact-gathering power and the defendant's right to be free of double jeopardy. The line represents "the broad perception that the Government's action has reached the point where its power to retrace its steps must be checked by the 'countervailing interests of the individual protected by the double jeopardy clause of the fifth amendment.' "[39]

In Press-Enterprise, the Court unanimously rejected the argument that jury selection is sufficiently preliminary and divorced from the trial's search for truth that it need not be open. The Court explained that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries

37/Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

38/Smith v. Phillips, 455 U.S. 209, 217 (1982).

39/Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 n.8 (1984) (quoting United States v. Velazquez, 490 F.2d 29, 34 (2d Cir. 1973)); see also Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979).

but to the criminal justice system."[40] The Court traced the history of jury selection noting its open character, from trials as early as the Norman Conquest. Of course, Press Enterprise was an explication of first amendment rights. But our point is that jury selection is and has been regarded as a critical part of trial; that the line between preliminary and trial issues is not etched in one place for all purposes does not suggest otherwise.

Second, if seen as a preliminary matter, the superintendence by an article III judge of the magistrate's handling of jury selection would be difficult at best. While the Raddatz majority did not insist that a district judge personally hear disputed testimony, it did insist an article III judge have the right of de novo review--plenary power to reject findings and insist on a new evidentiary hearing. But, surely such power must be real and not illusory. Review of a trial judge's rulings on challenges to veniremen is difficult at best, as illustrated by our experience in administering the standards of Witherspoon v. Illinois.[41] Witherspoon set the measure for veniremen's views regarding the death penalty in capital cases. The lower courts, including this court, read Witherspoon to require de novo review of a state trial judge's rulings on challenges made in the course of jury selection. This proved to be a difficult task.[42]

40/Id. at 505.

41/391 U.S. 510 (1968).

In Wainwright v. Witt,[43] the Court rejected the de novo standard in favor of the presumption of correctness standard of 28 U.S.C. § 2254(d) (fairly supported by the record). The Court noted the difficulties of such a de novo standard, concluding that "deference must be paid to the trial judge who sees and hears the juror."[44] It pointed to Reynolds v. United States,[45] in which the Court observed:

> [T]he manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.[46]

The Wainwright court also rejected the suggestion that a trial judge must make explicit findings in ruling on challenges for cause, recognizing the unique importance of sight and sound in the nigh intuitive judgments of a trial judge's rulings in the course of voir dire.[47] Squaring this difficulty with Raddatz's

42/See, e.g., O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984).

43/469 U.S. 412 (1985). "[T]he Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury. . . ." Gray v. Mississippi, 55 U.S.L.W. at 4643.

44/Wainwright, 105 S.Ct. at 853.

45/98 U.S. 145 (1879).

46/Wainwright, 105 S.Ct. at 854 n.9 (quoting Reynolds, 98 U.S. at 156-57).

47/Id. at 855.

insistence upon superintendence by an article III judge poses problems. An effort to engage in de novo review would be difficult and often impossible. Of course, we might conclude that a district court has the inherent power simply to conduct the voir dire a second time. But putting aside that such duplicative effort frustrates the very efficiency claims made in its support, such a power also faces serious practical problems in jury selection. The second voir dire or rehearing of testimony may never capture the original scene, and carrying a challenged veniremen to a second interrogation before the district judge would be a delicate exercise at best.[48] Unlike dispositive pretrial motions, there is no opportunity to convince the jury afresh at trial.

This absence of statutorily-prescribed review gains no comfort by finding inherent power to review by a constitutionally adequate standard, because such a savings exercise fails to respond to the inquiry into congressional purpose--a purpose illuminated by the failure of Congress to detail a standard or process for review despite the demonstrated view of its importance. The relevant point is we ought not lightly attribute to Congress the purpose to enter this thicket with no provision

48/"[T]he nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless." Gray v. Mississippi, 55 U.S.L.W. at 4643.

for review, whether or not these practical problems might be surmounted.

V

Three circuits have decided cases in which a magistrate presided over voir dire, but have disposed of the issue on the parties' failure to object. Only the Ninth Circuit has upheld the magistrate's presiding over voir dire on grounds of adequate article III control and efficiency.

In Haith v. United States,[49] the Third Circuit held that the judge's absence from the courtroom during jury selection in a criminal case was not error because the parties failed to object and because the defendant alleged no prejudice from the judge's absence.[50] The court reached its holding despite the absence of a stenographic record of voir dire to allow review.

The First Circuit in United States v. Rivera-Sola,[51] upheld a magistrate's presiding over voir dire, jury selection and preliminary instructions because the defendant failed to object. In dicta the court added, "We think that a magistrate can effectively conduct the voir dire and preside at the selection of juries in civil and criminal cases. . . ."[52] Interestingly, the

49/342 F.2d 158 (3d Cir. 1965) (per curiam).

50/Id. at 159.

51/713 F.2d 866 (1st Cir. 1983).

court indicated that preliminary instructions were an important part of the trial and should be handled by the judge, presumably on the assumption that instructions are not important to voir dire[53]--an assumption belied by the events of this case in which Ms. Demerson's views were exposed by the instruction on circumstantial evidence.

The Second Circuit in United States v. DeFiore,[54] also upheld a magistrate's presiding over voir dire because the defendant failed to make a contemporaneous objection to the action, thus waiving his claim to an article III court for jury selection.

The Ninth Circuit in two cases has addressed the validity of a magistrate's presiding over voir dire. In United States v. Bezold,[55] the court upheld the magistrate's actions even though the defendant in the criminal case timely objected. The decision found review and control in the district court adequate because (a) the judge could receive the transcript of voir dire, (b) the judge could observe the panel at trial, and (c) the judge had wide discretion to disqualify jurors after the trial began.[56]

52/Id. at 874.
53/Id.

54/720 F.2d 757, 765 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984).

55/760 F.2d 999 (9th Cir. 1985), cert. denied, 106 S.Ct. 811 (1986).

Lacking evidence of actual prejudice, the court affirmed the conviction.

In United States v. Peacock,[57] the Ninth Circuit upheld the delegation of jury selection to a magistrate under § 636(b)(3), imported a requirement of de novo review to avoid constitutional problems, and implicitly said that the conduct of voir dire is not an inherently judicial function even though it constitutes a "significant element of a criminal trial."[58] Finally, the court noted that the procedure may promote more rapid and efficient jury selection.[59]

None of these decisions faced the necessity of treating voir dire as a preliminary rather than as a part of trial; and significantly, none explained the necessity of the balance of the 1976 amendment if "additional duty" could carry its now claimed power. Moreover, none of the decisions expressed serious concern over the constitutionality of such acts. With respect, we see voir dire in a different light--of greater importance. The trial lawyer knows that who decides the truth from the evidence may be as important as the evidence. The process of selecting the persons to hear the evidence inevitably introduces the trial

56/Id. at 1002.

57/761 F.2d 1313 (9th Cir.), cert. denied, 106 S.Ct. 139 (1985).

58/Id. at 1317-19.

59/Id. at 1319.

players to the jury and itself triggers the decisional process. We have secured the rights to the selection process as an essential part of trial by jury and struggled to eliminate bias in its function.

It is then difficult to view jury selection as fit for delegation to magistrates as part of a congressional effort to free judges for performance of their "traditional adjudicatory duty." Rather, we see jury selection as such an integral component of trial that we are not persuaded that Congress envisioned its delegation to magistrates.

It is suggested that the sole limit of the congressional grant, by the additional duty section, of the power to delegate is that the delegation not violate another law or the Constitution. But as we have explained, such a broad reading of congressional purpose would render superfluous the balance of the statute. By that reading, the additional duty language was all that was necessary. Fairly read in context, Congress never intended that this language swallow all that preceded it. Additional duty is a residuum, granting the power to delegate any task not otherwise forbidden after we carve away that congery of duties that Congress never envisioned would be delegated. We are not persuaded that Congress intended to grant authority to judges to delegate to magistrates the authority to preside over felony trials and over activities integral to and intimately tied with trial.

Simply put, whatever the power of Congress may be, we are not persuaded that Congress intended that "additional duty" include presiding over jury selection in felony cases. The district court erred in allowing the magistrate to preside over the selection of the jury. But because Lois Ford did not object and because the trial was fundamentally fair, we AFFIRM.60/

60/Our conclusion that this trial was not fundamentally unfair despite the error is not a suggestion that, with consent of the parties, there is no error. Trusting that district judges will abide this decision, we have no occasion to exercise our supervisory jurisdiction to prevent its repetition.

RUBIN, J., Circuit Judge, with whom REAVLEY, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

The Magistrates Act authorizes district courts to delegate to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States." 1/ The majority opinion holds that Congress did not mean what it so plainly said, despite legislative history confirming that Congress indeed said what it intended. Allowing a magistrate to conduct voir dire is not contrary to any law of the United States, and the majority does not state that it is. The opinion states only, without deciding, that such a delegation under the direct supervision of the district judge might violate the constitutional guarantee of a jury trial in criminal cases and, therefore, that the statute should be construed to prohibit such a delegation. I differ both with this statutory interpretation and with the implicit constitutional construction, and I therefore respectfully dissent.

1/ 28 U.S.C. § 636(b)(3) (1982).

I.

The factual situation giving rise to this appeal is a common occurrence. Trial of two defendants was scheduled to begin, and a venire had been summoned. Judge David Belew, Jr., to whom the case was assigned, was still engaged in the trial of another case. Instead of recessing the trial in progress or sending the venire home, he orally requested Magistrate Alex McGlinchey to conduct jury selection. The magistrate introduced himself to the venire, explained the case, and conducted the first part of the voir dire. He then allowed counsel for each side to address the members of the venire and to ask them questions. He advised the two defendants, each of whom had different counsel, that they might each have ten peremptory challenges or, if they wished to exercise their challenges jointly, they might have twelve challenges. The defendants chose to exercise their challenges jointly. They made two challenges for cause. The government offered no objection to these challenges, and the magistrate allowed one and denied one. The parties then exercised their peremptory challenges, after which the magistrate excused the jury and instructed them to return two days later for trial.

The magistrate specifically instructed the defendants to notify the district judge of any matters he needed to consider in the two days between voir dire and the swearing of the jury. Nothing, however, was called to the district judge's attention. When the jury thus selected reported for trial, none of the parties raised any question concerning either the eligibility or qualifications of any juror, the procedure the magistrate had followed, or the comments he had made to the venire. In the

presence of the judge and of all parties, the clerk--not the judge--administered the oath to the jury, and the trial began. I use the latter words advisedly: Both in common vernacular and for the purpose we are now considering, that is when the trial began.

II.

Fed. R. Crim. P. 24 states, "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination." Although the prevailing practice in many federal district courts is for the trial judge to preside over the selection of a jury, the Rules do not require it. Professor Orfield, in his treatise Criminal Procedure Under the Federal Rules, states, "[N]either Rule 24(a) nor the principles of due process require the presence of the trial judge during the selection of a jury, and, as a general rule, the right to have the judge present during the selection of the jury may be waived." 2/

2/ 3 L. Orfield, Criminal Procedure Under the Federal Rules § 24.65, at 180 (1966).

A House Report on the 1976 amendments to § 636 of the Magistrates Act stated:

> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters" . . . .
>
> If the district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts. 3/

3/ H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Ad. News 6162, 6172 (emphasis added).

Senator Joseph Tydings, the Senate sponsor of the original Federal Magistrates Act, testified in the House hearings:

> The Magistrate[s] Act specifies . . . three areas [explicitly] because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned . . . .
>
> We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts." 4/

As the Seventh Circuit stated in In re Establishment Inspection of Gilbert & Bennett Manufacturing Co., 5/ "The only limitations on section 636(b)(3) are that the duties be consistent with the

Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)."

4/ Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 81 (1968) (emphasis added).

5/ 589 F.2d 1335, 1340-41 (7th Cir.), cert. denied, 444 U.S. 884, 100 S.Ct. 174 (1979).

Every other circuit that has considered this question has held that § 636(b)(3) allows a judge to delegate to a magistrate, as an "additional duty" within the meaning of this section, the quasi-judicial duty of presiding over voir dire. In United States v. Rivera-Sola, 6/ the First Circuit held that, by failing to object to a magistrate's conduct of voir dire, the defendant had waived his right to do so. But because this appeared to be a regular practice in the District Court of Puerto Rico, the court reviewed the procedure and, in a lengthy comment, approved. 7/ In United States v. DeFiore, 8/ the Second Circuit reached the same result, relying on the defendant's failure to object to the use of the magistrate. In United States v. Peacock 9/ and United States v. Bezold, 10/ the Ninth Circuit considered cases in which the defendant had timely objected, and found that § 636(b)(3) does authorize the conduct of voir dire by a magistrate. That court relied on the legislative history of the Act and the

listing of voir dire as an "additional duty" in the Legal Manual for United States Magistrates. 11/

6/ 713 F.2d 866 (1st Cir. 1983).

7/ Id. at 872-73.

8/ 720 F.2d 757, 764-65 (2d Cir. 1983), cert. denied, 467 U.S. 1241, 104 S.Ct. 3511 (1984).

9/ 761 F.2d 1313, 1317-19 (9th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 139 (1985).

10/ 760 F.2d 999, 1001-03 (9th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 811 (1986).

11/ Administrative Office of the United States Courts, Legal Manual for United States Magistrates § 3.10(3).

Circuit courts have also approved the delegation to magistrates of other duties not expressly enumerated in § 636. In Mathews v. Weber, 12/ the Supreme Court upheld the referral to magistrates of all actions to review administrative determinations regarding entitlement to Social Security benefits. And this circuit, in United States v. Boswell, 13/ permitted a magistrate to preside over four hours of closing argument when the trial judge became ill. There is no reason to read the statute as forbidding a similar delegation of the

conduct of voir dire to magistrates, provided, as the legislative history indicates, that the delegation does not offend the Constitution.

12/ 423 U.S. 261, 266-72, 96 S.Ct. 549, 552-55 (1976).

13/ 565 F.2d 1338, 1341-42 (5th Cir.), cert. denied, 439 U.S. 819, 99 S.Ct. 81 (1978).

In United States v. Raddatz, 14/ moreover, the Supreme Court was unanimous in finding that § 636 grants to judges the authority to delegate the holding of suppression hearings in criminal cases to magistrates. The Court in Raddatz was divided only on the issue of the constitutionality of this delegation absent a de novo hearing by the trial judge.

14/ 447 U.S. 667, 100 S.Ct. 2406 (1980).

III.

The real issue before us, then, is whether the delegation to a magistrate of the conduct of voir dire, subject to review by the district court, violates the Constitution. The majority first demolishes a straw man: It would (or might) be unconstitutional to delegate to a magistrate the trial of felony cases. That is not the issue. The sole question before us is

the constitutionality of delegating to an officer appointed by the court with express statutory authority, who is working under the direct supervision of a district judge, the duty of conducting voir dire. The majority opinion holds that presiding over voir dire is so inherently a part of trial that it must be done by a district judge in person. I do not agree with this sanctification of the voir dire process.

Whether the magistrate in this case gave the venire what might be considered a preliminary charge is irrelevant to the constitutionality of delegating to such a court officer the power of presiding at the preliminary stage of jury selection. What is significant is that the magistrate acts as an aide to the district judge under the judge's immediate supervision and control, and that all of the magistrate's actions are subject to de novo review.

In Peacock and Bezold, the Ninth Circuit held that selection of jurors by a magistrate does not offend Article III of the Constitution. No other circuit has expressly ruled on the constitutionality of such a delegation, although the First Circuit did state in dicta in Rivera-Sola that it would permit magistrates to conduct voir dire even if the defendant objected. Rulings by the Second 15/ and Third 16/ Circuits, that the parties may by silence waive their right to object to voir dire by a magistrate, at least imply that voir dire by a

magistrate does not violate the Constitution, for waiver of a constitutional right designed to protect the fairness of trial must be knowing, express, and intelligent. 17/

15/ United States v. DeFiore, 720 F.2d 757, 764-65 (2d Cir. 1983), cert. denied, 467 U.S. 1241, 104 S.Ct. 3511 (1984).

16/ Haith v. United States, 342 F.2d 158, 159 (3d Cir. 1965), att'g per curiam 231 F.Supp. 495 (E.D. Pa. 1964); Stirone v. United States, 341 F.2d 253, 255-56 (3d Cir.), cert. denied, 381 U.S. 902, 85 S.Ct. 1446 (1965).

17/ See Schneckloth v. Bustamonte, 412 U.S. 218, 235-40, 93 S.Ct. 2041, 2052-55 (1973).

The constitutionality of this delegation does not depend on finding "a floating point that adjusts to the issue," as the majority describes it. We nevertheless note the Supreme Court's statement, in Press-Enterprise Co. v. Superior Court, 18/ that the point at which a trial begins does indeed vary as a function of the right at issue. 19/ Thus, although, for purposes of double jeopardy, a trial begins when the first witness is sworn, it begins earlier for purposes of the public's first amendment right to attend criminal trials. We must apply the same reasoning in the case before us: The fact that voir dire may be treated as part of a trial for some purposes is not controlling.

18/ 464 U.S. 501, 104 S.Ct. 819 (1984).

19/ Id. at 509 n.8, 516, 104 S.Ct. at 823 n.8, 827.

Voir dire is an important stage in a felony trial, as it is in any jury trial, but it is not for this reason so "inherently judicial" that no part of it may be delegated to a magistrate. Comparing voir dire to other parts of a felony trial, certainly an evidentiary hearing on a motion to suppress evidence is at least as important; for it may determine the result. Yet, in United States v. Raddatz, the Supreme Court approved a magistrate's conduct of an evidentiary hearing on a motion to suppress evidence, as authorized by § 636(b)(1)(B) of the Magistrates Act."

The Court in Raddatz first held that the language of the Act does not require the district court to rehear the testimony on which the magistrate based his findings. "[T]he statute calls for a de novo determination, not a de novo hearing." 20/ Turning to the constitutional issues, the Court next found that the Act does not violate the Due Process Clause because it requires the district court to make a de novo determination of any disputed portion of the magistrate's proposed findings and recommendations. The Court stated, "Of course, the resolution of a suppression motion can and often does determine the outcome of

the case; this may be true of various pretrial motions." 21/ However, "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself." 22/

20/ Id. at 674, 100 S.Ct. at 2411.

21/ Id. at 677-78, 100 S.Ct. at 2413.

22/ Id. at 679, 100 S.Ct. at 2414.

Turning then to the question whether this delegation violates Article III, the Court stated:

> In passing the 1976 amendments to the Federal Magistrates Act, Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates. Accordingly, Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction. 23/

The Court concluded:

> Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," Mathews v. Weber, supra, 123 U.S., at 275, 96 S.Ct., at 556, that delegation does not violate Art. III so long as the ultimate decision is made by the district court. 24/

23/ Id. at 681, 100 S.Ct. at 2415 (footnote omitted).

24/ Id. at 683, 100 S.Ct. at 2416.

The majority seeks to distinguish Raddatz on the basis that suppression hearings are not so inherent a part of trial as voir dire. Certainly suppression hearings are even more likely to be outcome determinative. The defendant has the same right to a public proceeding 25/ and to the assistance of counsel. 26/ And the government is even permitted to lodge an interlocutory appeal if the hearing results in suppression. 27/ Other parts of a criminal trial, moreover, are performed outside the judge's presence. Fed. R. Crim. P. 15, for example, permits a deposition to be taken before another official and later to be offered in evidence at trial. Other "inherent" parts of trial are performed in the judge's presence but are not so inherently judicial that they must be performed by the judge. Fed. R. Crim. P. 31(a) requires that the verdict be returned "to the judge in open court." Yet it is common practice for the verdict to be returned to a clerk, reviewed by the court, and then read aloud by the clerk. And in this case, as is customary, the clerk administered the oath to the jury and the witnesses.

25/ See Waller v. Georgia, 467 U.S. 39, 45-47, 104 S.Ct. 2210, 2214-16 (1984); Gannett Co. v. DePasquale, 443 U.S. 368, 397, 406, 99 S.Ct. 2898, 2914, 2919 (1979); Rovinsky v. McKaskle, 722 F.2d 197, 201 (5th Cir. 1984).

26/ See, e.g., Davis v. Estelle, 529 F.2d 437 (5th Cir. 1976).

27/ See United States v. Kington, 801 F.2d 733, 735 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1888 (1987).

The conduct of voir dire is not considered so inherently judicial as to be non-delegable in civil cases. In Puryear v. Ede's Ltd., 28/ this court held that, after consent by the parties, a magistrate may conduct the entire trial of a civil jury case and enter final judgment. The panel found that the Magistrates Act is "saved from any constitutional infirmity by its requirement that all parties consent to such [delegation] and by the power of the district court to vacate the reference to the magistrate on its own motion." The court noted, "Each circuit facing this question has reached a similar conclusion." 29/ In Archie v. Christian, 30/ moreover, this court sitting en banc held that a civil trial conducted by a magistrate, even in the absence of consent by both parties, should not be set aside. If the delegation of voir dire to a magistrate does not violate the "right of trial by jury" guaranteed by the Seventh Amendment, I

do not see why it violates the Sixth Amendment right to "trial, by an impartial jury of the State and district wherein the crime shall have been committed," or the Article III guarantee that "[t]he trial of all Crimes, except in Cases of Impeachment; shall be by Jury."

28/ 731 F.2d 1153 (5th Cir. 1984).

29/ Id. at 1154.

30/ 808 F.2d 1132 (5th Cir. 1987) (en banc).

Even the delegation to magistrates of tasks considered to be "inherently judicial" in felony trials has been approved by other circuits. In United States v. Saunders, 31/ a Ninth Circuit case, the jury began deliberating on a Friday afternoon at about 4:30. The trial judge, for reasons that do not appear in the opinion, left a magistrate in charge of the proceedings. Shortly before 6:00 p.m., the magistrate sent for the jury. He learned that a verdict was not imminent and asked the jury to reconvene on Monday morning as the trial judge had instructed him to do. Three of the jurors informed the magistrate that they could not be present on Monday. None of the jurors objected to staying later on Friday or to returning Saturday morning. Although the magistrate was unable to reach the trial judge, he instructed the

jury to continue deliberations that evening. Half an hour later, the jury returned a guilty verdict. On appeal, the court rejected Saunders' argument, based on a constitutional separation-of-powers thesis, that the magistrate exceeded his authority in directing the jury to continue deliberations.

31/ 641 F.2d 659 (9th Cir. 1980), cert. denied, 452 U.S. 918, 101 S.Ct. 3055 (1981).

The court observed that "inherently judicial" tasks must be performed by Article III judges, 32/ but concluded:

> We find it unnecessary to decide whether the magistrate here performed an inherently judicial function. Despite the requirement that such functions be performed by Article III judges, the Supreme Court has recently upheld the constitutionality of certain judicial actions by magistrates. Under the "para-judge" rationale, the Magistrates Act comports with Article III because it subjects magistrates' rulings to de novo determination by a federal district judge. See United States v. Raddatz, 447 U.S. 667, 681-684, 100 S.Ct. 2406, 2415-16, 65 L.Ed.2d 424 (1980) (magistrate conducted suppression hearing); Mathews v. Weber, 423 U.S. 261, 266-72, 96 S.Ct. 549 (1976) (social security case referred to magistrate for preliminary findings and recommendation). Thus, the Supreme Court has allowed magistrates to perform "inherently judicial" tasks when under the supervision of an Article III judge. 33/

32/ Id. at 663, citing Glidden Co. v. Zdanok, 370 U.S. 530, 549, 82 S.Ct. 1459, 1472 (1962); In re Bakelite Corp., 279 U.S. 438, 458, 49 S.Ct. 411, 416 (1929).

33/ Id. (emphasis added).

A later Ninth Circuit decision relied on Saunders in rejecting a similar argument. In Hinman v. McCarthy, 34/ the State of California had appealed from a district court order granting a writ of habeas corpus. The State argued that 28 U.S.C. § 636(b)(1)(B), which authorizes federal magistrates to conduct evidentiary hearings in habeas proceedings, violates Article III. The court upheld the delegation, stating:

> Although magistrate[-conducted] evidentiary hearings and subsequent recommended disposition of habeas corpus petitions might be considered "inherently judicial" tasks, under Raddatz delegation of those responsibilities cannot be considered unconstitutional as the district judge retains the power to make the final decision. The district judge could, at the request of the habeas corpus petitioner, or on his own motion, conduct his own evidentiary hearing if he deemed it necessary. 35/

In comparison, even if supervising voir dire is considered an "inherently judicial" task, Raddatz requires us to sanction it provided the district judge retains the power to make an effective de novo review.

34/ 676 F.2d 343 (9th Cir.), cert. denied, 459 U.S. 1048, 103 S.Ct. 468 (1982).

35/ Id. at 346-47.

Section 636(b)(3) authorizes judges to "assign" magistrates "additional duties" not inconsistent with the Constitution and laws of the United States. District courts impliedly have the power, in assigning these additional duties, to retain the role of making de novo determinations. Section 636(b)(1), which explicitly allows magistrates to conduct evidentiary hearings and mandates de novo review of actions to which the parties object, in no way detracts from the judge's inherent and implicit reservation of the power to make a de novo determination when delegating other duties to a magistrate.

In this case, although the trial judge had the power to review in advance the proposed voir dire questions or the magistrate's explanation of the case, he did not choose to do so. The parties, however, did not object to any of the questions or to any actions of the magistrate, despite the magistrate's instruction to the defendants to raise any matters with the judge that he needed to consider before trial began. The availability of de novo review satisfies constitutional requirements, but it need not be exercised in the absence of a request. 36/ The judge's

failure to screen the questions or the magistrate's explanation of the case before the magistrate conducted voir dire, therefore, does not constitute a constitutional violation.

36/ Delgado v. Bowen, 782 F.2d 79, 81-82 (7th Cir. 1986); United States v. Peacock, 761 F.2d 1313, 1318 (9th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 139 (1985); see also 28 U.S.C. § 636(b)(1)(C).

Several appellate decisions involving the delegation to magistrates of duties other than voir dire confirm our reading of § 636(b)(3). Even though the trial judge may not be required to exercise de novo review when the parties have entered no objection, the judge is nevertheless allowed to conduct de novo review at his discretion. In Delgado v. Bowen, 37/ the district court had referred a motion for summary judgment to a magistrate, and, although the parties did not object to the magistrate's findings, the district judge reviewed the entire record de novo and chose not to follow the magistrate's recommendation. The Seventh Circuit held that the district judge did not act improperly, and emphasized the legislative history of the Federal Magistrates Act, which clearly permits de novo determinations by the district judge at all times. 38/ In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 39/ the Supreme Court noted that, when judges refer pre-trial motions to a magistrate,

the judge remains "free to rehear the evidence or to call for additional evidence." Indeed, in United States v. Lewis, 40/ this circuit said, "It is for the district court to decide how much [from a suppression hearing] it wishes to rehear." Thus, the district court's authority to make a de novo review of voir dire proceedings is not limited to matters about which the parties object. The judge might elect to do so sua sponte, but in this case he did not. The Constitution does not require us to mandate de novo review in every case.

37/ 782 F.2d 79 (7th Cir. 1986).

38/ Id. at 82.

39/ 458 U.S. 50, 79, 102 S.Ct. 2858, 2875 (1982).

40/ 621 F.2d 1382, 1387 (5th Cir. 1980), cert. denied, 450 U.S. 935, 101 S.Ct. 1400 (1981).

Both Raddatz and circuit court decisions following it have emphasized the distinction between de novo review and a de novo hearing. Although the district court is not required to hold a hearing to review all magistrate-conducted suppression hearings, or to do so when the parties contest the magistrate's credibility determinations, the district court nevertheless retains the discretion to hold a new hearing. 41/ Similarly, when a magistrate

conducts voir dire, the trial judge retains the discretion to review the questions asked, and to question the jurors again on his own. 42/ This circuit may choose to institute rules that require the district judge to be available while a magistrate conducts voir dire so that the judge can review contested rulings in court at the time the dispute arises and observe the prospective juror's demeanor; 43/ but the absence of these rules in the statute is not an unconstitutional restriction of the trial judge's power of review. Moreover, the absence of any credibility issue in this case renders the judge's failure to observe juror responses in person immaterial.

41/ See Raddatz, 447 U.S. at 675-81, 100 S.Ct. at 2412-15; United States v. Hardin, 710 F.2d 1231, 1235 (7th Cir.), cert. denied, 464 U.S. 918, 104 S.Ct. 286 (1983).

42/ See Peacock, 761 F.2d at 1318.

43/ Cf. Levit, Nelson, Ball and Chernick, Expediting Voir Dire: an Empirical Study, 44 S. Cal. L. Rev. 916, 930-36 (1971) [hereinafter cited as Levit].

Review of magistrate-conducted voir dire thus appears no less adequate than review of magistrate-conducted suppression hearings. As the Ninth Circuit assumed in United States v. Peacock and as the district court and the parties apparently did in this case, the district judge could review the conduct of voir

dire at his discretion and would do so at the request of the parties. How the district judge should proceed--e.g., whether he should screen questions in advance--addresses a procedural matter and not the per se unconstitutionality of the delegation itself.

Depending on the procedure followed, adequate superintendence of the magistrate's conduct of voir dire by the district judge might be difficult in some cases. No problems arose here. None has arisen in any of the other cases in which the magistrate has been permitted to conduct voir dire. The hypothetical slippery slopes posed by the majority should not be the basis for depriving district judges of the power Congress has expressly given them.

In practice, even before passage of the Magistrates' Act, the Constitution has not been deemed to require the court to conduct voir dire. In Haith v. United States, 44/ the district court's approval of the delegation of voir dire to magistrates relied partly on the testimony of lawyers that they recalled only one criminal case in the Eastern District of Pennsylvania in more than ten years in which the jury was selected in the presence of a judge. In addition, the court found that there was never any "absolute common law requirement" that the judge be present during voir dire. 45/ And in Stirone v. United States, 46/ voir dire was supervised by a deputy clerk.

44/ 231 F. Supp. 495, 497 (E.D. Pa. 1964), aff'd per curiam, 342 F.2d 158 (3d Cir. 1965).

45/ Id. at 498. See also Hopt v. Utah, 110 U.S. 574, 577-79, 4 S.Ct. 202, 203-05 (1884).

46/ 341 F.2d 253 (3d Cir.), cert. denied, 381 U.S. 902, 85 S.Ct. 1446 (1965).

Centuries ago, under the common law of England, challenges for cause were exercised relatively infrequently, 47/ probably because of the more homogeneous nature of jury venires at that time, 48/ but they were nevertheless deemed an important part of the defendant's right to a trial by jury. 49/ Yet court decisions indicate that it was not remarkable for challenges for cause to be tried to and decided by panels of other jurors rather than by the judge, 50/ and that such challenges may have been tried outside the presence of the judge. 51/ The majority's citation of a passage in Blackstone's Commentaries, which is expressly limited to challenges by the king and does not mention the practice of trying the defendant's challenges for cause before other jurors, is not to the contrary. 52/

47/ Levit, supra, at 922.

48/ See id.; Moore, Voir Dire Examination of Jurors: II. The Federal Practice, 17 Geo. L.J. 13, 36 (1928).

49/ See 4 W. Blackstone, Commentaries *352-53; The Trial of Peter Cook (1696), 4 Hargrave's State Trials 738, 748.

50/ See Anonymous, 1 Salkeld 152 (1795); 9 W. Holdsworth, A History of English Law 183 (3d ed. 1944); J. Thayer, A Preliminary Treatise on Evidence at the Common Law 123-24 (1898); Moore, Voir Dire Examination of Jurors: I. The English Practice, 16 Geo. L.J. 438, 442-43 (1928); see also Mima Queen v. Hepburn, 7 Cranch 290, 296-97 (1813); J. Goebel and T. Naughton, Law Enforcement in Colonial New York 618-19 (1944).

51/ See Hopt v. Utah, 110 U.S. at 577-79, 4 S.Ct. at 203-05; Anonymous, 1 Salkeld 152.

52/ That passage reads:

> This privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4, which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the person so challenged; and then, and not sooner, the king's counsel must show the cause, otherwise the juror shall be sworn.

W. Blackstone, supra, at *353.

Not only does the delegation of voir dire to a magistrate uphold the integrity of the trial process; it is also consistent with the Article III principle of separation of powers. The Supreme Court has often stated that the tenure and salary guarantees of Article III principally serve a separation-of-powers function; their dominant purpose is "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government." 53/ Clearly, the availability of adequate de novo review by the trial judge preserves the independence of the judiciary. 54/

53/ Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59, 102 S.Ct. 2858, 2865 (1982); accord Commodity Futures Trading Comm'n v. Schor, ___ U.S. ___, ___, 106 S.Ct. 3245, 3256, 3257 (1986); United States v. Will, 449 U.S. 200, 217-19, 101 S.Ct. 471, 482-83 (1980); O'Donoghue v. United States, 289 U.S. 516, 530-34, 53 S.Ct. 740, 743-44 (1933).

54/ Cf. Raddatz, 447 U.S. at 681-83, 100 S.Ct. at 2415-16; Hinman v. McCarthy, 676 F.2d 343, 346 (9th Cir.), cert. denied, 459 U.S. 1048, 103 S.Ct. 468 (1982); United States v. Saunders, 641 F.2d 659, 663 (9th Cir. 1980), cert. denied, 452 U.S. 918, 101 S.Ct. 3055 (1981).

The Supreme Court's decision in Commodity Futures Trading Commission v. Schor 55/ confirms this separation-of-powers analysis. That opinion emphasizes the importance of an independent judiciary as distinguished from administrative

agencies. Article III "safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" 56/

55/ ___ U.S. ___, 106 S.Ct. 3245 (1986).

56/ Id. at ___, 106 S.Ct. at 3257 (citation omitted) (emphasis added).

This structural principle on which the Court relied does not relate to the performance of duties within the judicial branch. A fortiori, there is no reason to condemn a delegation of power within the judicial branch by an Article III judge to an officer who is appointed by the court and whose actions are not only under the judge's instructions but are subject to plenary review.

In Donovan v. Sarasota Concrete Co., 57/ the Eleventh Circuit considered another type of delegation to a magistrate, that of the power to make a probable-cause determination for the issuance of an administrative warrant. The court stated:

> Under the Magistrates Act, a district court retains general supervisory power to review any action taken by a federal magistrate. This is because the magistrates themselves are not Article III judges. Magistrates are allowed to

> perform "inherently judicial" acts only because they act under the supervision of an Article III judge. Decisions by a magistrate pursuant to 28 U.S.C. § 636(b) are not final orders and may not be appealed until rendered final by a district court.
>
> The principal consideration prompting the requirement of formal judicial review, and indeed the concept underlying the establishment of an Article III judiciary, is the desire to insulate judicial acts from executive and legislative coercion. Therefore, the proper method to ensure that a magistrate's determination remains untainted by such coercion is review by an Article III court. 58/

57/ 693 F.2d 1061 (11th Cir. 1982).

58/ Id. at 1066-67 (citations omitted).

IV.

The Magistrates Act expressly authorizes district courts to delegate to magistrates any duty not inconsistent with the Constitution or laws of the United States. These express words are buttressed by a clear declaration of Congressional intent that the office of magistrate be used in an innovative and imaginative way. 59/

59/ See Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 81 (1968).

Every other circuit that has considered the issues before us has interpreted the Act to permit the delegation of voir dire to a magistrate, and the only circuits that have have considered the constitutionality of such a delegation have upheld it. We should not deprive district judges of the power to use the assistance given them by Congress to make their judicial function more efficient by posing a constitutional spectre in order to reach a statutory interpretation that denies the statutory words their plain meaning.

I therefore respectfully dissent.

d States of America vs.

United States District Court for

NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DEFENDANT: LOIS E. HILTON FORD

DOCKET NO → CR-4-84-108

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: FEBRUARY DAY: 7TH YEAR: 1985

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL Carmen Glasner, court-appointed.

DEFENDANT'S ADDRESS: 1111 Rempeford, Katy, Texas 77450 (County of Conroe)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a [illegible]/verdict of [X] NOT GUILTY. Defendant is discharged as to Counts 1, 3, 4 and 5. [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of Conspiracy; Covering up material facts to Government Agency; Theft of Government Property and Aiding and Abetting, in violation of Title 18, Sections 371, 1001, 641 and 2.

OFFENSE COMMITTED: Count 1 - April 10, 1981.
Count 3 - April 21, 1981.
Count 4 - July 23, 1981.
Count 5 - July 23, 1981.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on Count 1, no restitution required; three (3) years on Count 3, and three (3) years on Count 4, said sentences to run concurrently with Count 1; and three (3) years on Count 5, said sentence to run consecutively to sentences imposed on Counts 1, 3 and 4, and sentence of imprisonment on Count 5 is probated under the usual conditions of Probation.

IT IS FURTHER ORDERED that the defendant to report to U.S. Marshal's Office at 10:00 a.m. on February 24th, 1986 to commence serving sentenc[illegible]

U. S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS

FILED

FEB 7 1986

NANCY HALL DOHERTY, CLERK

By [signature]

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

Certified a true copy of an instrument on file in my office on March 20, 1986
NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By [signature] Deputy

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U S Marshal or other qualified officer.

SIGNED BY

[ ] U S District Judge

[ ] U S Magistrate

[signature]
DAVID O. BELEW, JR.

Date 2/7/86

120

Appendix E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1098
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOIS E. HILTON FORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(August 22, 1986)

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

RUBIN, Circuit Judge:

A federal magistrate presided at the selection of the jury for a felony trial, without objection by the accused. The district judge, however, was present when the clerk administered the oath to the jury and throughout the trial. We hold that the magistrate's participation in jury selection did not violate the statutory provisions regulating the scope of the duties that may

Appendix "B"

be delegated to a magistrate or deny the accused due process of law. We also affirm the defendant's conviction on the charge of covering up a material fact, in violation of 18 U.S.C. § 1001, and her conviction on the charge of theft of a motor vehicle finding no legally significant variation between the indictment and the evidence presented by virtue of a difference in two digits of the identification number of a vehicle otherwise accurately described in the indictment.

I.

Two of the four persons charged in a multi-count indictment entered guilty pleas. When trial of the case against the remaining two defendants, Owen Ray Hilton and his erstwhile wife, Lois E. Hilton Ford, was to begin, Judge David Belew, Jr., to whom the case was assigned, was still engaged in the trial of another case. He orally requested Magistrate Alex McGlinchey to preside during the selection of a jury. The magistrate introduced himself to the jury venire, explained the case, and conducted the first part of the voir dire. He then allowed counsel for each side to address the jury and continue with the voir dire. He advised the two defendants, each of whom was represented by different counsel, that they each might have ten peremptory challenges or, if they wished to exercise their challenges jointly, they could have twelve challenges. The defendants agreed to exercise their challenges jointly. After the magistrate granted

one challenge for cause, without objection, the parties exercised their peremptory challenges. The jury was then excused. Two days later, the jury was recalled and then sworn before Judge Below. Prior to trial, no objection to the procedure was lodged either with the magistrate or Judge Below.

Federal Rule of Criminal Procedure 24 states, "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination." 1/ The prevailing practice in federal court is for the trial judge to preside over the selection of a jury, but the federal rules do not require it. Professor Orfield, in his treatise Criminal Procedure Under the Federal Rules, states, "[N]either Rule 24(a) nor the principles of due process require the presence of the trial judge during the selection of a jury, and, as a general rule, the right to have the judge present during the selection of the jury may be waived." 2/

1/ Fed. R. Crim. P. 24(a).

2/ 3 L. Orfield, Criminal Procedure Under the Federal Rules, § 24.65, at 180 (1966).

The powers of a United States Magistrate are set out in 28 U.S.C. § 636. After authorizing the magistrate to perform certain specific duties, 3/ the statute, at § 636(b)(3), states: "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 4/ The House Report on the bill that was eventually enacted indicates that this "additional-duties" provision is to be broadly construed as authorizing magistrates to perform a wide range of quasi-judicial tasks. 5/ It adds that this section "enables the district courts to continue innovative experimentations in the use of this judicial officer." 6/ The Legal Manual for United States Magistrates lists as an "additional duty" that may be delegated to a magistrate the "[c]onduct[ing] of voir dire and selecti[ng] of juries for district judge." 7/

3/ 28 U.S.C. § 636(a) & (b)(1) & (b)(2) (Supp. 1986).

4/ Id. § 636(b)(3).

5/ H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Ad. News 6162, 6172, cited in United States v. Rivera-Sola, 713 F.2d 866, 872 (1st Cir. 1983).

6/ Id.

7/ Administrative Office of the United States Courts, Legal Manual for United States Magistrates § 3.10(3).

In accordance with congressional intent, the authority given courts to delegate to magistrates powers not explicitly mentioned in §§ 636(a) or (b)(1) & (2) has been held to sanction the delegation of a number of quasi-judicial duties. Thus, in Mathews v. Weber, 8/ the Supreme Court upheld a district court rule that required initial reference to a magistrate of all actions to review administrative determinations regarding entitlement to Social Security benefits. In United States v. Saunders, 9/ the Ninth Circuit held that it was permissible for a magistrate, when the judge left him in charge of a jury during deliberations, to direct the jury to continue its deliberations during evening hours. Even if this action was "inherently judicial," the court found that the magistrate might constitutionally execute it under the supervision of an Article III judge because the magistrate was acting, in effect, as a "para-judge." 10/ The Seventh Circuit has held that 28 U.S.C. § 636(b)(3) permitted a magistrate to issue a warrant authorizing the Secretary of Labor to inspect a workplace. The court found the action not inconsistent with the Constitution and federal laws and not forbidden by § 636(b)(1). 11/ And this circuit has refused to reverse a conviction on the ground that, when the judge became ill, the magistrate presided during four hours of closing argument. 12/

8/ 423 U.S. 261, 96 S.Ct. 549 (1976).

641 F.2d 659 (9th Cir. 1980), cert. denied, 452 U.S. 918, 101 S.Ct. 3055 (1981).

10/ Id. at 663-65 (distinguishing United States v. De La Torre, 605 F.2d 154, 155-56 (5th Cir. 1979)).

11/ Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1340-41 (7th Cir.), cert. denied, 444 U.S. 884, 100 S.Ct. 174 (1979); see also Empire Steel Mfg. Co. v. Marshall, 437 F.Supp. 873, 881-82 (D. Mont. 1977).

12/ United States v. Boswell, 565 F.2d 1338, 1341-42 (5th Cir.), cert. denied, 439 U.S. 819, 99 S.Ct. 81 (1978) (court found that substitution of magistrate violated Fed. R. Crim. Proc. 25(a), but found violation not of constitutional magnitude).

The question whether the judge must be present when a jury was selected was first raised in Stirone v. United States, 13/ in which selection of a jury by a deputy clerk was challenged in a collateral attack on a prior conviction. The judge had been present during most of the voir dire but left the bench to go to his chambers when counsel began making their peremptory challenges. 14/ Because there had been no objection, the court found that the defendant had waived his right to object to the absence of the judge. Then in a footnote, 15/ the Third Circuit added:

> In fairness to the trial judges of this circuit, hereafter in criminal cases, irrespective of suggestion of waiver by the parties, trial judges will not leave the bench during

any part of the voir dire or other jury selection process without recessing the court.

13/ 341 F.2d 253 (3d Cir.), cert. denied, 381 U.S. 902, 85 S.Ct. 1446 (1965).

14/ Id. at 255.

15/ Id. at 256 n.3.

Shortly after it decided Stirone, however, the Third Circuit, in Haith v. United States, 16/ affirmed a district court decision approving the selection of a jury by counsel outside the judge's presence. The district court opinion stated that this had been the prevailing practice in both the Eastern and Western Districts of Pennsylvania for many years and the court held that the right to object had been waived by the parties. 17/

16/ 342 F.2d 158 (3d Cir. 1965), aff'g per curiam, 231 F. upp. 495 (E.D. Pa. 1964).

17/ 231 F.Supp. at 498.

The precise issue presented in this case, the selection of a jury by a federal magistrate in a criminal case, was first considered by the First Circuit in United States v. Rivera-Sola. 18/ The court held that, by failing to object to the procedure ini-

tially, the defendant had waived his right to do so. But because this appeared to be the practice in the District Court of Puerto Rico, the appellate court went on to review it and, in a lengthy comment, approved. 19/ The court concluded:

> We think that a magistrate can effectively conduct the voir dire and preside at the selection of juries in civil and criminal cases, thus saving valuable time for our busy district court judges. The trial of criminal cases is, however, entrusted to district judges. Preliminary as well as final jury instructions play an important part in the trial of any case. The jury should not be given the impression that the instructions given it are merely a routine matter of form. 20/

In United States v. DeFiore, 21/ the Second Circuit reached the same result, relying on the defendant's failure to object to the use of the magistrate.

18/ 713 F.2d 866 (1st Cir. 1983).

19/ Id. at 872-73.

20/ Id. at 874.

21/ 720 F.2d 757, 764 (2d Cir. 1983), cert. denied, 467 U.S. 1241, 104 S.Ct. 3511 (1984).

In these cases, the defendant had not objected, but the Ninth Circuit has found an objection without merit. In United

States v. Peacock, 22/ that court held that the selection of jurors by a magistrate offends neither the statute nor Article III of the Constitution, even when the defendant has timely objected, so long as de novo review of the jury selection procedure by the district court is available.

This conclusion is sound in principle. Magistrates are para-judicials appointed to assi t trial judges. The very purpose of their appointment is to minimize the burden on Article III judges of detailed work and thus enable judges to handle a greater volume of truly judicial assignments. When this new judicial office was created, Congress could not foresee the precise scope of the duties a magistrate might perform, so it encouraged innovation and experiment. So long as no inherently judicial task is delegated to the magistrate in violation of the Constitution or the express provisions of the statute, the innovative use of magistrates fulfills Congress' purpose. We therefore hold not only that the right to object was waived, but that objection would have been without merit if voiced.

22/ 761 F.2d 1313, 1317-19 (9th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 139 (1985).

While the due process argument was not specifically addressed, as such, in any of the cases we have cited, due process requires only fundamental fairness. 23/ The procedure

followed in this case was entirely fair, subject to review by the district court, and permitted by the statute and Article III of the Constitution. We, therefore, join our sister circuits in approving the use of federal magistrates to preside over jury selection in civil and criminal cases.

23/ See Haith v. United States, 231 F.Supp. 495, 498 (E.D. Pa. 1964), aff'd per curiam, 342 F.2d 158 (3d Cir. 1965), 3 L. Orfield, supra note 1, at 180.

II.

The evidence, construed most favorably to the Government as it must now be, shows a scheme to swindle the United States that was bound eventually to be uncovered. In 1981, Ford and her then husband, Hilton, together with two others, conspired to obtain government property, ostensibly by purchasing it with checks drawn on accounts known by them to have insufficient funds, then to resell the property and pocket the proceeds without honoring the checks. Count I of the indictment, which charged a conspiracy to embezzle, steal, and purloin property of the United States, lists a number of overt acts. This is typical: On June 17, 1981, Lois E. Hilton Ford opened an account in a West Galveston, Texas, bank in the name of Ford Equipment Company, depositing $200. She thereafter made no further deposits. A month later, on July 15, she submitted a bid to the General Ser-

vices Administration in the amount of $10,529.00 for four vehicles, which had previously been declared surplus property. Having been awarded the bid, Ford presented a check for $10,529.00 drawn on the recently established account. She or her husband then sold the vehicles without, of course, honoring the check.

Ford does not challenge the sufficiency of the evidence to support her convictions under Count 3, theft of government property, [24] and Count 5, aiding and abetting [25] She does, however, challenge her conviction under Count 4 of the indictment, which charges a violation of 18 U.S.C. § 1001. It states that Ford "covered up a material fact to the General Services Administration . . . by representing that a check of the value of $10,529.00, for the purchase of four vehicles was covered by sufficient funds" in the bank on which the check was drawn "when, as she there knew, there was not sufficient funds in said account to cover such an amount of money." The proof at trial showed that Ford identified herself with her driver's license when she presented the check, but did not advise the General Services Administration that insufficient funds were on deposit to pay the check.

24/ 18 U.S.C. § 641.

25/ 18 " S.C. § 2.

No evidence was adduced of any specific, affirmative representation by Ford at the time she presented the check to the Government. She argues, therefore, that, under the Supreme Court's reasoning in Williams v. United States, [26] there was insufficient evidence to support the allegation in Count 4 and that the jury should not have ruled on this charge. The Supreme Court decision in Williams, however, concerned a conviction under 28 U.S.C. § 1014, not § 1001, the statute invoked here. Section 1014 makes it a crime to "knowingly make any false statement . . . for the purpose of influencing in any way the action of" certain federal agencies. [27] The Court in Williams construed the criminal statute strictly, stating that, "[a]lthough petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a 'false statement,' for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." [28]

26/ 458 U.S. 279, 284-90, 102 S.Ct. 3088, 3091-95 (1982).

27/ 18 U.S.C. § 1014.

28/ 458 U.S. at 284, 102 S.Ct. at 3091.

The indictment in this case, however, does not allege a "false statement." Although § 1001 makes it a crime to make "any false, fictitious or fraudulent statements," the Government pursued its case under another part of § 1001 that makes it a crime to "knowingly and willfully . . . cover[] up by any trick, scheme or device a material fact." 18 U.S.C. § 1014, the statute interpreted in Williams, does not have a similar provision.

The Williams Court declined to hold that a check constitutes, in effect, an implied representation to its receiver that funds sufficient to cover the check are in the account because it feared the "wider implications" of such a ruling. The Court reasoned that such an interpretation of "false statement," as used in § 1014, would mean that:

> any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability, whether or not the drawer had an intent to defraud. Under the Court of Appeals' approach, the violation of § 1014 is not the scheme to pass a number of bad checks; it is the presentation of one false statement--that is, one check that at the moment of deposit is not supported by sufficient funds--to a federally insured bank. . . . Indeed, each individual count of the indictment in this case stated only that petitioner knowingly had deposited a single check that was supported by insufficient funds, not that he had engaged in an extended scheme to obtain credit fraudulently. 29/

29/ 458 U.S. at 286-87, 102 S.Ct. at 3092-93 (emphasis in original) (footnote omitted).

The Court's attention to "scheme" and "intent to defraud" in this passage suggests that § 1001 covers just what § 1014, read strictly, does not reach. In United States v. London, we stated "that full effect must be given to the 'trick, scheme, or device' language of the first clause of § 1001," 30/ and added, "The mere omission of failing truthfully to disclose a material fact . . . does not make out an offense under the conceal or cover up clause of § 1001. Instead, the latter clause of § 1001 requires the government to prove something more--that the material fact was affirmatively concealed by ruse or artifice, by scheme or device." 31/

30/ 550 F.2d 206, 213 (5th Cir. 1977).

31/ Id. at 214 (footnote omitted).

The Government proved that requisite "something more" in this case. Ford did not merely give the Government a check knowing there were not funds sufficient to cover the amount in the account. She joined the other defendants in a scheme pursuant to which bank accounts were opened in the names of companies that existed only for the purpose of issuing checks, vehicles were purchased with checks drawn on these company accounts, and the defendants not only knew that the accounts had insufficient funds but had the intent not to honor the checks. These actions con-

stitute a "trick, scheme, or device" to "cover up a material fact" to a government agency. 32/ The conviction under Count 4 is, therefore, affirmed.

32/ See id. at 213 & n. 6 (and cases discussed therein).

III.

Ford also complains of a variance between the proof adduced at trial and the allegations under Count 5 of the indictment. The indictment alleged theft of property of the United States, described as a 1978 Dodge Pick-up vehicle having a of Vehicle Identification Number "D14AE815227389." The evidence at trial established that the vehicle taken was as described in the indictment, except that the Identification Number of the pickup was "D14AE8S227389." Thus, the only variance of which Ford complains is the substitution of the numerals "15" in the charge for the letter "S" shown at trial.

A mere variance in proof that does not affect the substantial rights of the accused will not warrant setting aside a conviction. 33/ If the allegation and proof "substantially correspond," the conviction is valid. 34/ Here the type of vehicle described in the indictment was the same as proved by the evidence, and the difference in the two numbers can hardly be considered significant. Ford had adequate notice that she was

charged with theft of the particular vehicle described. 35/ As stated in United States v. Cox, "The validity of an indictment is governed by practical, not technical considerations. A conviction will not be reversed because of minor deficiencies which have not prejudiced the defendant." 36/ Accordingly, we also affirm the conviction on Count 5.

33/ See, e.g., United States v. Phillips, 625 F.2d 543, 545-46 (5th Cir. 1980).

34/ Berger v. United States, 295 U.S. 78, 83, 55 S.Ct. 629, 631, (1935) (quoting Washington & G.R. Co. v. Hickey, 166 U.S. 521, 531, 17 S.Ct. 661, 665 (1897)).

35/ Id. at 82, 55 S.Ct. at 630; United States v. Davis, 592 F.2d 1325, 1328 (5th Cir.), cert. denied, 442 U.S. 946, 99 S.Ct. 2894 (1979).

36/ 664 F.2d 257, 258 (11th Cir. 1981).

For these reasons, we AFFIRM the judgment of the court below.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1098

U.S. COURT OF APPEALS
FILED
SEP 18 1986
GILBERT F. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOIS E. HILTON FORD,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(September 18, 1986)

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

Appendix C

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1098
Summary Calendar

D.C. Docket No. CR-4-84-108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOIS E. HILTON FORD,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

August 22, 1986

ISSUED AS MANDATE:

Appendix D

OP-JDT-9C
Rev. 4/85

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 14 1984
NANCY HALL DOHERTY, CLERK
By J Madden
Deputy

UNITED STATES OF AMERICA

VS.

OWEN RAY HILTON
LOIS E. HILTON FORD
BILLIE RUTH VAN HUSS
BARRY BAILEY HILTON

CRIMINAL NO CR 4-84-108

The Grand Jury charges:

COUNT 1

Beginning prior to on or about April 10, 1981, and continuously thereafter up to and including the date of the return of this Indictment, in the Fort Worth Division of the Northern District of Texas, and elsewhere, OWEN RAY HILTON, LOIS E. HILTON FORD, BARRY BAILEY HILTON and BILLIE RUTH VAN HUSS, defendants and co-conspirators, unlawfully, wilfully and knowingly did agree, combine, conspire and confederate with each other and with other persons both known and unknown to the Grand Jury to commit offenses against the United States, to wit: wilfully and knowingly embezzle, steal and purloin goods and property of the United States of the value of more than one hundred dollars, in violation of Title 18, United States Code, Section 641, and wilfully and knowingly cover up a material fact to an agency and department of the United States, in violation of Title 18, United States Code, Section 1001.

Certified a true copy of an instrument on file in my office on March 20, 1986
NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By Brenda Beach Deputy

Appendix F

MANNER AND MEANS

Among the manner and means by which OWEN RAY HILTON, LOIS E. HILTON FORD, BARRY BAILEY HILTON and BILLIE RUTH VAN HUSS would carry out the conspiracy were the following:

1. It was further a part of the conspiracy that one or more of the conspirators would set up a company to do business under an assumed name.

2. It was further a part of the conspiracy that one of the conspirators would open a bank account in the assumed name.

3. It was further a part of the conspiracy that one of the conspirators would bid on vehicles offered for sale by the General Services Administration of the United States, (G.S.A.).

4. It was further a part of the conspiracy that upon acceptance by the G.S.A. of the bid, one of the conspirators would present a check for the bid amount to the G.S.A., said check having been drawn on the aforesaid account, with knowledge that there were insufficient funds on deposit in the account to pay the check.

5. It was further a part of the conspiracy that one or more of the conspirators would go to the location of the bid upon vehicles and take possession of the vehicles.

6. It was further a part of the conspiracy that one or more of the conspirators would obtain quick title to the vehicles from the State of Texas.

7. It was further a part of the conspiracy that the vehicles would then be offered for sale and sold by one or more of the conspirators in Texas and elsewhere.

8. It was further a part of the conspiracy that if contacted by the G.S.A. in an effort to collect the dishonored check, one of the conspirators would make promises to pay G.S.A.

9. It was further a part of the conspiracy that on some occasions, one of the conspirators would make partial restitution for the bad check.

10. It was further a part of the conspiracy that no other payments would be made for the vehicles received from the G.S.A.

11. It was further a part of the conspiracy that the aforesaid manner and means be repeated by one or more of the conspirators with reference to other sales by the G.S.A.

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects thereof, the conspirators did, in the Northern District of Texas and elsewhere, commit the following overt acts:

1. On or about April 10, 1981, OWEN RAY HILTON, defendant, opened Account Number 0803486, in the name "Auto Wholesale" at the American Bank, Palestine, Texas, with a deposit of $100.00.

2. On or about April 15, 1981, OWEN RAY HILTON, defendant, under the name O. R. Hilton, Auto Wholesale, submitted bids on Sale Number 7DPS-81-30 to the G.S.A., 819 Taylor Street, Fort Worth, Texas, in the amount of $3,441.00 for Item No. 244, a 1978 Chevrolet Sport Van, VIN CGL368U212350 and $3,401.00 for Item Number 245, a 1978 Chevrolet Sport Van, VIN CGL368U210695.

3. On or about April 21, 1981, OWEN RAY HILTON, defendant, presented to the G.S.A. Check Number 103, in the amount of $6,842.00, on Account Number 0803486, drawn on the American Bank, Palestine, Texas.

4. On or about April 22, 1981, OWEN RAY HILTON and LOIS E. HILTON FORD, defendants, received the aforesaid vehicles in Sale Number 7DPS-81-30, Item Numbers 244 and 245, in Houston, Texas, and took them from the possession of the G.S.A.

5. On or about May 26, 1981, OWEN RAY HILTON and LOIS E. HILTON FORD, defendants, sent a check for $1,500.00, by United States mail, to John Acker of the G.S.A., along with a false statement by defendant OWEN RAY HILTON that he "had trouble with these Vans. . ." but would "be able to get them fixed and floored in a week or so," when in truth and in fact he had, on April 29, 1981, sold one of the vehicles, VIN CGL368U210695, to Anthony W. Richards.

6. On or about June 15, 1981, OWEN RAY HILTON and LOIS E. HILTON FORD, defendants, sold the other vehicle, VIN CGL368U212350, to Bill J. Lisenbee.

7. On or about June 17, 1981, LOIS E. HILTON FORD, defendant, opened Account Number 110-379, at the Bank of the West, Galveston, Texas, in the name Ford Equipment Company, with a deposit of $200.00.

8. On or about July 15, 1981, LOIS E. HILTON FORD, defendant, under the name Ford Equipment Company, submitted bids on Sale Number 7DPS-81-49, to the G.S.A., 819 Taylor Street, Fort Worth, Texas, in the amount of $10,529.00 for: Item Number 129, 1978 Ford Carryall, VIN E12HHCG8342; Item Number 272, Honda Trailbike, VIN CT90-1511048; Item Number 275, 1978 Dodge Pickup, VIN D14AE85227389; and Item Number 301, 1977 Datsun 280Z, VIN HLS-30-377339.

9. On or about July 23, 1981, LOIS E. HILTON FORD, defendant, presented to the G.S.A. Check Number 120, in the amount of $10,529.00, on Account Number 110-379, drawn on the Bank of the West, Galveston, Texas.

10. On or about July 23, 1981, LOIS E. HILTON FORD, defendant, received the aforesaid vehicles from Sale Number 7DPS-81-49, Item Numbers 129, 272, 275 and 301, and took them from the custody of the G.S.A.

11. On or about August 26, 1981, OWEN RAY HILTON and LOIS E. HILTON FORD, defendants, sold the 1978 Dodge Pickup, VIN D14AE85227389, to City Car Company, San Bernadino, California, for at least $2,000.00.

12. On or about August 16, 1981, LOIS E. HILTON FORD and BILLIE RUTH VAN HUSS, defendants, opened Account Number 435-570, at the Citizens State Bank, Dickinson, Texas, in the name Royale Leasing and Sales, with a deposit of $2,850.00.

13. On or about August 19, 1981, LOIS E. HILTON FORD, defendant, submitted bids, under the name Royale Leasing and Sales, on Sale Number 7DPS-81-53, to the G.S.A., 819 Taylor Street, Fort Worth, Texas, in the amount of $12,957.00, for the three vehicles.

14. On or about August 19, 1981, BILLIE RUTH VAN HUSS, defendant, under the name A to Z Sales, submitted bids on Sale Number 7DPS-81-53 to the G.S.A., 819 Taylor Street, Fort Worth, Texas, in the amount of $29,521.00, for ten vehicles, including: Number 45, a 1979 Toyota Celica, VIN MA46015894; Number 87, a 1976 AMC Hornet, VIN A6057A0370908; Number 98, a 1977 AMC Hornet, VIN A7A057C242373; and Number 108, a 1978 AMC Gremlin, VIN A8A464G436633.

15. On or about August 31, 1981, BILLIE RUTH VAN HUSS and OWEN RAY HILTON, defendants, opened Account Number 051-128 at the Baybrook National Bank, Friendswood, Texas, in the name A & Z Sales, with a deposit of $200.00.

16. On or about September 1, 1981, BILLIE RUTH VAN HUSS, defendant, presented to G.S.A. Check Number 282, in the amount of $29,521.00 on Account Number 051-128, drawn on the Baybrook National Bank, Friendswood, Texas.

17. On or about September 5, 1981, BILLIE RUTH VAN HUSS, OWEN RAY HILTON and BARRY BAILEY HILTON, defendants, received the aforesaid vehicles from Sale Number 7DPS-81-53, Item Numbers 45, 87, 98 and 108, and took them from the custody of the G.S.A.

A violation of Title 18, United States Code, Section 371.

COUNT 2

On or about April 21, 1981, in the Northern District of Texas, OWEN RAY HILTON, defendant, knowingly and wilfully, covered up a material fact to the General Services Administration, a Department of the United States, by representing that a check of the value of $6,842.00, for the purchase of two vehicles, was covered by sufficient funds on deposit in Account Number 0803486 at the American Bank, Palestine, Texas, when, as he then knew, there was not sufficient funds in the Palestine, Texas, bank account to cover such an amount of money.

A violation of Title 18, United States Code, Section 1001.

COUNT 3

On or about April 21, 1981, in the Northern District of Texas, OWEN RAY HILTON and LOIS E. HILTON FORD, defendants, wilfully and knowingly did embezzle, steal and purloin two 1978 Chevrolet Sport Van vehicles, one bearing Vehicle Identification

Number CGL368U212350, and the other bearing Vehicle Identification Number CGL368U210695, each of the value of more than one hundred dollars of the goods and property of the United States.

A violation of Title 18, United States Code, Sections 641 and 2.

COUNT 4

On or about July 23, 1981, in the Northern District of Texas, LOIS E. HILTON FORD, defendant, knowingly and wilfully, covered up a material fact to the General Services Administration, a Department of the United States, by representing that a check of the value of $10,529.00, for the purchase of four vehicles, was covered by sufficient funds in Account Number 110-379, Bank of the West, Galveston, Texas, when, as she then knew, there was not sufficient funds in said account to cover such an amount of money.

A violation of Title 18, United States Code, Section 1001.

COUNT 5

On or about July 23, 1981, in the Northern District of Texas, OWEN RAY HILTON and LOIS E. HILTON FORD, defendants, wilfully and knowingly did embezzle, steal and purloin one 1978 Dodge Pickup vehicle, bearing Vehicle Identification Number D14AE815227389, of the value of more than one hundred dollars of the goods and property of the United States.

A violation of Title 18, United States Code, Sections 641 and 2.

COUNT 6

On or about September 1, 1981, in the Northern District of Texas, BILLIE RUTH VAN HUSS, defendant, knowingly and wilfully, covered up a material fact to the General Services Administration, a Department of the United States, by representing that a check, of the value of $29,521.00, for the purchase of ten vehicles, was covered by sufficient funds in Account Number 051-128, Baybrook National Bank, Friendswood, Texas, when, as she then knew, there was not sufficient funds in said account to cover such an amount of money.

A violation of Title 18, United States Code, Section 1001.

COUNT 7

On or about September 1, 1981, in the Northern District of Texas, OWEN RAY HILTON, BARRY BAILEY HILTON and BILLIE RUTH VAN HUSS, defendants, wilfully and knowingly did embezzle, steal and purloin four vehicles, a 1978 Toyota Celica, Vehicle Identification Number MA46015894; a 1976 AMC Hornet, Vehicle Identification Number A6057A0370908; a 1977 AMC Hornet, Vehicle Number A7057C242373; and a 1978 AMC Gremlin, Vehicle Identification Number A8A464G436633; each of the value of more than one hundred dollars of the goods and property of the United States.

A violation of Title 18, United States Code, Sections 641 and 2.

A TRUE BILL.

M Mitchell
FOREMAN

James A. Rolfe
JAMES A. ROLFE
UNITED STATES ATTORNEY

J. Michael Worley
J. MICHAEL WORLEY
ASSISTANT UNITED STATES ATTORNEY
310 U. S. Courthouse
Fort Worth, Texas 76102
Telephone: 817-334-3291

Q. Do you see the individual in the courtroom today who handed you that check on the, I believe the 23rd of September, 1981?

A. Yes, uh-huh.

Q. Can you point that individual out to the jury?

A. Yes, it's the lady, the second lady right there in the red blouse.

Q. All right. Now -- okay. It's the lady in the -- would you describe how she is dressed today?

A. Okay. She has a striped jacket on.

Q. Okay.

MR. WORLEY: Your Honor, may the record reflect the witness has identified the defendant Lois Hilton Ford Farquhar?

THE COURT: All right. It so shows.

BY MR. WORLEY:

Q. All right. Now, when the defendant handed you that check, did she say anything about the check that you recall?

A. No, not that . . .

Q. Would it -- would it have been something that you would remember if the defendant had handed you a check and said, now, this is not any good, you're going to have to hold it for a month or so.

A. Well, if she had said that, I wouldn't have accepted it.

Q. Why wouldn't you have accepted a check that wasn't good?

A. Well, it's just not policy to accept a bad check.

Q. Okay. I take it, then, you had no knowledge that that check

Appendix "B" 6

A. A woman came in to give me this check for some items that she was high bid on on a particular sale, and I accepted this check as payment.

Q. All right. Did you put any notations on that check or make any marks on that check?

A. Yes. On the back I put her driver's license.

Q. All right. And is that reflected on there where you put it?

A. Yes, uh-huh, it is.

Q. Okay. Can you tell the jury who handed you that check?

A. Okay. Yes.

Q. What was the name of the individual who gave you that check?

A. Lois -- the one who signed it, or the one who gave it to me?

Q. The one who gave it to you.

A. Okay. Lois Ford.

Q. All right. And is she also the one that signed that check?

A. Yes, uh-huh.

Q. Okay. [redacted] did you identify her?

What date did she give you that check?

A. 7/23/81.

Q. And at what location, ma'am?

A. In the sales office where I work, on the 6th floor.

Q. And is that in the GSA building here --

A. Yes, sir, in the federal building here in Fort Worth.

Q. Fort Worth, Tarrant County, Texas?

A. Right, uh-huh.